U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 10 February 2006

CASE NO.: 2002-BLA-05231

BRB NO.: 03-0808 BLA

In the Matter of

MATTHEW J. CHUPLIS
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances: Helen M. Koschoff, Esquire
For Claimant

Gayle M. Green, Esquire
Donald Neely, Esquire
For Director

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901, et seq. ("the Act"), and the regulations issued thereunder, which are found in title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of coal miners whose death was

[1] The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.R. Parts 718, 722, 725, and 726 (2002). Because this case was filed after January 19, 2001, all citations to the regulations refer to the amended regulations.

due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lung resulting from coal dust inhalation.

I. BACKGROUND

A. Procedural History

On July 9, 2001, Matthew J. Chuplis ("Claimant") filed a claim for benefits[2] which was denied by the District Director, U.S. Department of Labor, Office of Workers' Compensation Programs ("Director"). In response, Claimant requested a formal hearing before an Administrative Law Judge ("ALJ") and a hearing on this matter was held before me in Reading, Pennsylvania, on February 11, 2003. On August 7, 2003, I issued a Decision and Order Denying Benefits ("D&O").[3] Claimant then filed a Notice of Appeal, dated August 28, 2003, to the Benefits Review Board ("BRB" or "the Board"). The Board acknowledged receipt of the appeal by memorandum dated September 8, 2003. By correspondence dated October 8, 2003, the Director informed the Chief Administrative Appeals Judge of a change of counsel on its behalf.

By Decision and Order dated August 30, 2004 ("BRB"),[4] the Board affirmed my denial of benefits in part and vacated in part, consequently remanding the D&O for further consideration consistent with its opinion. On September 29, 2004, the Director filed a Motion for Reconsideration of the Board's Order of Remand. On March 30, 2005, the Board issued a Decision and Order on Reconsideration[5] ("BRB2") granting the Director's Motion for Reconsideration and modifying its original Decision and Order accordingly. The Order of Remand was nevertheless sustained and the file was returned to me on June 24, 2005. I subsequently set August 5, 2005, as the deadline for submission of briefs in this matter.[6] The Director timely filed a brief dated August 1, 2005. This decision, based upon consideration of the Board's Decision and Order, now follows.

B. ALJ Decision and Order of August 7, 2003

On August 7, 2003, I issued a Decision and Order denying Claimant benefits under the Act. D&O at 10. In order to establish entitlement to benefits under the provisions of the Act, Claimant had to prove (1) that he has a history of coal mine employment; (2) that he has pneumoconiosis; (3) that the pneumoconiosis arose out of his coal mine employment; (4) that he is totally disabled; and (5) that his total disability is due to pneumoconiosis. D&O at 4.

Although Claimant successfully established six years of coal mine employment, D&O at 4, I concluded that Claimant was unable to establish the presence of pneumoconiosis under §

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[2] Throughout this opinion, "DX" refers to Director's exhibits, "CX" refers to Claimant's exhibits, and "Tr." refers to pages in the transcript of the February 11, 2003 formal hearing.

[3] My Decision and Order of August 7, 2003, will be cited in this opinion as "D&O at -."

[4] The Board's Decision and Order of August 30, 2004, will be cited in this opinion as "BRB at -."

[5] The Board's Decision and Order on Reconsideration of March 30, 2005, will be cited in this opinion as "BRB2 at -."

[6] Claimant did not submit a brief in support of his position(s) on remand. Therefore, I will reference Claimant's brief dated April 28, 2003, in support of his position(s) now before me. Claimant's Brief in Support of Claim Petition will be cited as "CB at -."

718.202(a) of the Act. D&O at 8. I first found that the X-ray evidence was in equipoise and therefore did not, by itself, support a finding of pneumoconiosis under § 718.202(a)(1). D&O at 6. Next, because I found that Dr. Gregory E. Cali had superior qualifications to those of Dr. Raymond Kraynak, I credited Dr. Cali's testimony with more weight and found that the medical opinion evidence did not support a finding of pneumoconiosis under § 718.202(a)(4). D&O at 8. Specifically, Dr. Cali had opined that Claimant could not return to coal mine work because of asthma. D&O at 7. Therefore, after weighing the X-ray evidence with the medical opinion evidence, I found that Claimant had failed to establish the presence of pneumoconiosis and thus failed to establish the first element of entitlement.

Since I found that Claimant had failed to establish the presence of pneumoconiosis, I addressed the remainder of the elements of a Black Lung claim *arguendo*. First, because I only credited Claimant with six years of coal mine employment, I found that he was not entitled the rebuttable presumption of 20 C.F.R. § 718.203(b) that the presence of pneumoconiosis "arose out of coal mine employment." D&O at 9. Therefore, I concluded that he failed to establish that element of the entitlement analysis. Next, because the Director had stipulated that Claimant was totally disabled, I found that Claimant had established total disability pursuant to 20 C.F.R. § 718.204(c). D&O at 9. But, by crediting Dr. Cali's attribution of disability to asthma, I found that Claimant had failed to establish that his total disability was due to pneumoconiosis. D&O at 9. Accordingly, I found that Claimant had failed to establish all but one element of entitlement and therefore denied benefits.

C. BRB Decision and Order of August 30, 2004

On appeal to the Board, Claimant challenged a number of my findings. They included my findings that he did not establish (1) the presence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a); (2) that the pneumoconiosis arose out of coal mine employment pursuant to § 20 C.F.R. 718.203(c); and (3) that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. § 718.204(c).

The first major issue of Claimant's appeal was that I erred in finding that he failed to establish the presence of pneumoconiosis. Claimant first contended that I erred in my consideration of the X-ray evidence under 20 C.F.R. § 718.202(a)(1). BRB at 2. The Board noted that I mischaracterized some of the X-ray evidence. The Board found, contrary to my D&O, that the record did not reveal that Dr. Benjamin was a B-Reader as well as a Board-certified radiologist. BRB at 3. The Board also found that Dr. Navani read the September 20, 2001 X-ray for quality purposes only, as opposed to my finding that he had interpreted that X-ray as negative. Id. For these reasons, the Board vacated my finding that the X-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a) and remanded the case for further consideration. As another sub-issue, Claimant also challenged certain evidentiary rulings concerning the X-ray evidence that I made in my D&O. First, Claimant contended that the evidentiary limitations set forth at 20 C.F.R. § 725.414 were invalid but the Board rejected that contention. BRB at 5. Claimant then challenged my exclusion of Dr. Thomas Miller's reading of the September 13, 2002 X-ray. Id. The Board ruled that this X-ray reading was properly excluded but instructed me to provide Claimant with an opportunity to

submit a statement from Dr. Smith regarding his interpretation of the September 13, 2002 X-ray as rehabilitative evidence. BRB at 6.

The next sub-issue of Claimant's appeal was his contention that I erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(4). Specifically, Claimant argued that I failed to consider that Dr. Cali, the physician who's opinion I most credited and relied upon, based his opinion on evidence not admitted into the record – Dr. Michael Miller's negative interpretation of Claimant's September 20, 2001 X-ray. BRB at 7. The Board noted that 20 C.F.R. § 725.414 provides that any X-ray referenced in a medical report must be admissible. Id. Thus the Board vacated my finding pursuant to 20 C.F.R. § 718.202(a)(4) and instructed me to address the significance of Dr. Cali's reliance upon an inadmissible X-ray report. BRB at 8. The Board, in footnote 9, also noted that I failed to explain my basis for finding that Dr. Cali's opinion was "better reasoned and supported by the objective record." BRB at 8, fn. 9. The Board specifically mentioned that I erred to the extent that I credited Dr. Cali's opinion because it was supported by Claimant's pulmonary function study results. Id. For the foregoing reasons, the Board instructed that should I find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1) or (a)(4), I must weigh all of the relevant evidence together pursuant to C.F.R. § 718.202(a) under the precedence of Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

The second major issue of Claimant's appeal was that he contended that I erred in finding that he failed to establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203(c). The Board noted that I summarily concluded that Claimant had not established this element of entitlement without explaining why Dr. Kraynak's opinion that Claimant's pneumoconiosis arose out coal mine employment was insufficient to establish that element. BRB at 8. Therefore, the Board found that my analysis did not comply with the requirements of the APA, specifically 5 U.S.C. § 557(c)(3)(A). Id. The Board thus vacated my finding pursuant to 20 C.F.R. § 718.203(c).

The third major issue of Claimant's appeal was his contention that I erred in finding the evidence insufficient to establish that his total disability was due to pneumoconiosis pursuant 20 C.F.R. § 718.204(c). Specifically, Claimant contended that I failed to provide an adequate explanation for rejecting Dr. Kraynak's opinion regarding the etiology of Claimant's pulmonary disability. BRB at 9. The Board agreed with Claimant's contentions and thus vacated my finding on this element of entitlement. BRB at 10.

D. BRB Decision and Order on Reconsideration of March 30, 2005

On reconsideration, the Director contended that the Board erred in refusing to address his challenge to my finding of six years of coal mine employment. BRB2 at 2. After consideration of the Director's assertions, the Board agreed. Id. The Board first affirmed my finding that Claimant was entitled to credit for four years of coal mine employment from 1946 to 1950. BRB2 at 3, fn. 2. The Board then stated that I failed to provide any basis for my finding that Claimant's Social Security records are incomplete. BRB2 at 3. The Board thus vacated my finding that Claimant is entitled to credit for two years of coal mine employment based upon his

work at Hammond Coal Company and remanded for me to reconsider the length of coal mine employment for which Claimant should be credited for his work for Hammond. Id.

II. ISSUES ON REMAND

In its Decision and Order of August 30, 2004, the Board vacated my findings pursuant to 20 C.F.R. §§ 718.202(a)(1) and (a)(4), 718.203(c) and 718.204(c). In its Decision and Order on Reconsideration of March 30, 2005, the Board vacated my finding of Claimant's length of coal mine employment. Consequently, the issues to be addressed on remand are:

1. Length of Claimant's coal mine employment
    - Specifically, the length of coal mine employment for which Claimant should be credited for his work at Hammond Coal Company

2. Whether there is a presence of pneumoconiosis
    a. Further consideration of Claimant's 20 C.F.R. § 718.202(a)(1) evidence in light of the Board's findings
        i. Record does not reveal that Dr. Benjamin is dually-qualified as B-Reader and Board-certified radiologist
        ii. Dr. Navani read the September 20, 2001 X-ray for quality only
        iii. Provide Claimant with an opportunity to submit a statement from Dr. Smith regarding his interpretation of the September 13, 2002 X-ray
    b. Further consideration of Claimant's 20 C.F.R. § 718.202(a)(4) evidence
        i. Address the significance of Dr. Cali's reliance upon an inadmissible X-ray report
        ii. Explain the basis for finding that Dr. Cali's opinion is "better reasoned and supported by the objective record"
    c. Weigh all of the relevant evidence together pursuant to 20 C.F.R. § 718.202(a)

3. Whether the pneumoconiosis arose out of coal mine employment
    a. Address Dr. Kraynak's opinion that Claimant's pneumoconiosis arose out of his coal mine employment

4. Whether total disability was due to pneumoconiosis
    a. Further consideration of Claimant's 20 C.F.R. § 718.204(c) evidence

III. DISCUSSION

Because this claim was filed subsequent to January 19, 2001, Claimant's entitlement to benefits must be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. Benefits are provided under the Act for miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the

evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3a) the miner it totally disabled, and (3b) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994). In addition, the Board in this matter has mandated that I address the issue of length of coal mine employment, BRB2 at 3, as it is relevant to several of the aforementioned elements.

A. The Length of Coal Mine Employment

In my D&O, I found that Claimant had established six years of coal mine employment. D&O at 4. The Board affirmed my finding that Claimant was entitled to credit for four years of coal mine employment from 1946 to 1950. BRB2 at 3, fn. 2. However, the Board vacated my finding that Claimant is entitled to credit for two years of coal mine employment based upon his work at Hammond Coal Company ("Hammond"). BRB2 at 3. Specifically, the Board noted that I erred in my determination that Claimant's Social Security records were incomplete. Consequently, the Board instructed me to reconsider the length of coal mine employment for which Claimant should be credited for his work for Hammond. Id.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. Kephart v. Director, OWCP, 8 BLR 1-185 (1985). An ALJ must calculate the length of a claimant's coal mine employment in accordance with 20 C.F.R. § 725.101(a)(32). The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. § 725.101(a)(32)(ii). Neither the Act nor the regulations provide specific guidelines for the computation of the number of years of coal mine employment; however, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. Dawson v. Old Ben Coal Co., 11 BLR 1-58 (1988)(*en banc*); Vickery v. Director, OWCP, 8 BLR 1-430 (1986).

The Board has held that a finding of the length of coal mine employment may be based exclusively on the Claimant's own testimony, where it is uncontradicted and credible. Bizarri v. Consolidation Coal Co., 7 BLR 1-343 (1984). However, the Board has approved the crediting of Social Security records over a claimant's testimony and co-worker's affidavits where Claimant's memory was unreliable and the co-workers failed to state that the claimant had worked continuously with them during the periods of employment specified. Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984) (citing Hall v. Director, 2 B.L.R. 1-998 (1980).

Claimant has only proffered his own testimony, "which he respectfully contends is credible," CB at 6, and the affidavits of John Rooney and Vincent Maloney in support of his position that he should be credited with three years of coal mine employment at Hammond.[7] The affidavits of John Rooney and Vincent Maloney acknowledge that Claimant was employed by Hammond but they fail to specify a time period of employment there. CX-8; CX-10. Therefore, Claimant's own testimony is the only evidence of record proffered by Claimant in order to meet

[7] I acknowledge that Claimant only asserted 6 years of coal mine employment in his brief. CB at 7. But Claimant testified that he worked at Hammond from 1950 to 1952. Tr. at 22. The Social Security records reveal that Claimant worked at Hammond in the year 1952. DX-4. Therefore, I must assume that Claimant meant he worked at Hammond from 1950 *through* 1952, which is actually three years of employment, not two.

his burden of establishing length of coal mine employment at Hammond. Claimant's Social Security records have been proffered into evidence by the Director. As the Board noted in BRB2, Claimant's Social Security records include all the years from 1948 through 2000. BRB2 at 3; DX-4. There is no employment information for the year 1950. The Social Security records for 1951 do not reveal any employment with Hammond but they do disclose employment with three other employers from April 1951 through December 1951. DX-4. The Social Security records for 1952 reveal that Claimant was employed by Hammond from April 1952 through September 1952. DX-4. The records also reveal that he was employed by three other companies from July 1952 through December 1952. DX-4.

The Director contends in his brief[8] that "there is no credible, reliable evidence that Claimant worked at Hammond for more than [a] one-half year period." DB2 at 1. The Director notes that Claimant's Social Security records reflect only two quarters of employment with Hammond. DX-4; DB2 at 2. The Director then proceeds to argue that "Claimant offered hesitant, vague answers regarding his work at Hammond and the Social Security records which suggest that his work at Hammond (beyond the two quarters established by the Social Security records) was, at best, sporadic." DB2 at 2. The essence of the Director's contention is that Claimant's testimony regarding his employment at Hammond is neither credible nor reliable and the Social Security records should be credited over his testimony. Claimant's argument is that his testimony should be credited over the Social Security records. Resolution of this issue therefore hinges on an assessment of the reliability of Claimant's testimony pertaining to his length of employment at Hammond.

I agree with the Director that Claimant's testimony was vague and confusing concerning his length of employment at Hammond. Numerous examples of this are found throughout the transcript:

On direct examination:

> Q: Okay. And, now, you had said you went there in, I believe you said 1950, but they're actually only showing postings for two quarters of 1952.
>
> A: That's the best I can recollect from that time.
>
> Q: How long were you with Hammond?
>
> A: *I thought it was from '50 to '52*.
>
> Q: Okay. How were you paid at Hammond?
>
> A: (No audible response)
>
> Q: If you remember?

[8] Director's brief dated August 1, 2005 will be cited as "DB2 at -" within this opinion. Director's brief dated April 28, 2003 will be cited as "DB1 at -."

A: Well, *I think it was cash at that time*.

Q: Did there come a point when they started taking out Social Security, do you know?

A: *I'm not sure of that*.

Tr. at 21-22 (emphasis added).

On cross-examination:

Q: Okay. And when you went to work for Hammond Coal, was that after you graduated from high school –

A: Yes.

Q: -- or before?

A: Correct.

Q: After? Was that your first job after high school?

A: Right, *I think it was*.

Tr. at 28 (emphasis added).

Q: Okay, 1950. And do you know what month you started working at Hammond Coal Company?

A: I *thought it was in July or August. I'm not sure of that*.

Q: Okay. And why did you stop working at Hammond Coal Company?

A: Lack of work and a, a year later they went bankrupt, anyway, *in '50* –

Q: Okay.

A: -- *'53 or '54*.

Tr. at 30-31 (emphasis added).

Q: Okay. Do you know when you got on steady at –

A: I –

Q: Hammond?

A: -- *can't remember that*.

Tr. at 31 (emphasis added).

The emphasized excerpts demonstrate that Claimant was unsure of his answers pertaining to when he was employed by Hammond. The vagueness and uncertainty of his testimony discredits the reliability of his memory. But standing alone, I would not have completely discredited Claimant's testimony because I acknowledge that he was testifying about employment undertaken over fifty years ago. It would not be unrealistic to expect Claimant to remember every detail of his employment at Hammond. However, because Claimant's testimony does not reconcile the fact that his Social Security records suggest that he was only employed at Hammond for a six month period, his recollection on the issue is unreliable. At the outset, I acknowledge that Social Security records are only as good as the reporting, and employers may cash wages without withholding money for Social Security. The Board alluded to this in BRB2 when it stated: "The fact that Claimant's Social Security records do not reveal any employment in 1950 indicates only that the Social Security Administration ("SSA") was never notified of any employment during this time period." BRB2 at 3. However, Claimant has not proffered any reason or explanation of why I should credit his testimony over the Social Security records, which reflect that Hammond did report some withheld tax. Claimant first testified that he was paid cash during his time at Hammond. Tr. at 22. Later, the following exchange occurred on cross-examination:

Q: Do you recall if you were paid a different way before you were working steadily for Hammond?

A: I took different job classes at different payments at that time.

Q: Okay.

A: Like the helper would be different from a spotter at the shovel, or helping on the, on the –

Q: And when you say different payments, do you mean the amount of money was different or the way you were paid?

A: I think the wage, the hourly wage.

Q: Okay. In terms of whether you were paid in cash or not, was that different, depending on what level –

A: I don't know, no.

Tr. at 32. With this testimony on record, it is counterintuitive to believe that Hammond would have employed Claimant for three years, paying him in cash the entire time, but only report six months of employment to the SSA[9]. It is Claimant's burden to resolve this major discrepancy in his position and I find that Claimant has failed to do so. In addition, the fact that Claimant's Social Security records document Claimant's employment with other companies in 1951 and 1952 weighs in favor of the Director's position. Claimant's employment with other entities calls into question the amount of time he could have worked in coal mine employment during that period.

Because of the vagueness and uncertainty of Claimant's testimony, as well as the major discrepancy between his testimony and his Social Security records, I find that the Social Security statement entered into the record by the Director is the most reliable means of establishing Claimant's length of employment at Hammond See Tackett, *infra*. For that reason, I find that Claimant has only established six (6) months of coal mine employment at Hammond Coal Company.

Accordingly, I credit Claimant with four and one-half (4 ½) years of coal mine employment.

B. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).

(2) Biopsy or autopsy evidence: § 718.202(a)(2).

(3) Regulatory presumptions: § 718.202(a)(3):

(4) Physician's opinions based upon objective medical evidence: § 718.202(a)(4).

The Board affirmed my findings that §§ 718.202(a)(2) and (a)(3) were not applicable to this claim. The Board did, however, vacate my findings pursuant to §§ 718.202(a)(1) and (a)(4).

1) 20 C.F.R. § 718.202(a)(1) – Chest X-ray Evidence

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102.[10] It is well-established that the

[9] Unfortunately for him, Claimant's position would have been better supported had no employment at Hammond been recorded with the SSA or if he had testified that the manner in which he was compensated differed during the time he was employed.

[10] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP., 6 B.L.R. 1-535, 537 (1983). The Benefits Review Board ("BRB") has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials	I.L.O. Class
09/20/01	10/14/01	DX-13	Benjamin	BCR[11]	Completely negative
09/20/01	01/20/02	DX-12	Navani	B-Reader; BCR	Quality reading only[12]
09/20/01	06/07/02	CX-1	Cappiello	B-Reader; BCR	1/1
09/13/02	09/17/02	CX-11	Smith	B-Reader; BCR	1/0
09/13/02	11/25/02	CX-21	Ahmed	B-Reader; BCR	1/1
09/13/02	03/06/03	DX-31	Navani	B-Reader; BCR	Completely negative

The Board vacated my finding that the X-ray evidence in this case is insufficient to establish the existence of pneumoconiosis pursuant to § 718.202(a)(1). The Board found that I erred in two respects; (1) characterizing Dr. James K. Benjamin as dually-qualified as both a Board-certified radiologist and a B-Reader; and (2) finding that Dr. Shiv Navani rendered a negative interpretation of the September 20, 2001 X-ray. BRB at 3. After curing these errors, I proceed with my analysis.

The proceeding chart demonstrates that there are two X-rays of record. The first X-ray, dated September 20, 2001, was interpreted completely negative by Dr. Benjamin and as I.L.O. Category 1/1 positive by Dr. Enrico Cappiello. Since Dr. Cappiello is dually-qualified as both a B-Reader and a Board-certified radiologist while Dr. Benjamin is only qualified as a Board-certified radiologist, I give Dr. Cappiello's interpretation more probative weight. For that reason, I find that the September 20, 2001 X-ray is positive for pneumoconiosis.

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[11] As the Board noted, Dr. James K. Benjamin is a Board-certified radiologist but not a B-Reader. DX-26.
[12] As the Board noted, Dr. Shiv Navani read the 09/20/01 chest X-ray for quality only. DX-12.

The second X-ray of record is dated September 13, 2002, and was read by three physicians of record. Dr. Henry K. Smith, a Board-certified radiologist and a B-Reader, interpreted it as Category 1/0 positive. Dr. Afzal Ahmed, who is likewise dually-qualified, interpreted the X-ray as Category 1/1 positive. In contrast, Dr. Shiv Navani, who is also dually-qualified, interpreted the X-ray as completely negative. Dr. Smith's positive interpretation is corroborated by Dr. Ahmed's, while Dr. Navani's negative interpretation is uncorroborated in the record. Since two dually-qualified physicians gave corroborating positive interpretations of the September 13, 2002 X-ray, I find that it is positive for pneumoconiosis.

The record therefore contains two X-rays which I find to be positive and none that I find to be negative. It is within the discretion of an ALJ to rely on the numerical superiority of X-ray readings. Edmiston v. F & R Coal Co., 14 B.L.R. 1-65 at 1-68. Accordingly, I find that the preponderance of the X-ray evidence pursuant to 718.202(a)(1)[13] demonstrates the presence of pneumoconiosis.

2) 20 C.F.R. § 718.202(a)(4) – Medical Opinion Evidence

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

[13] It should be noted that the Board also ruled that on remand I should provide Claimant with an opportunity to submit a statement from Dr. Smith regarding his interpretation of the September 13, 2002 X-ray. BRB at 6. The record does not contain such a statement from Dr. Smith. Regardless, such a submission is not essential to Claimant's claim since I have found in his favor that the September 13, 2002 X-ray is positive for pneumoconiosis.

In my initial D&O, I discussed the conflicting reports of Dr. Gregory E. Cali and Dr. Raymond Kraynak as the § 718.204(a)(4) evidence of record. By crediting Dr. Cali's opinion greater probative weight than Dr. Kraynak's, I found that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to this provision of the Act. On appeal, Claimant argued that I erred in my consideration of Dr. Cali's opinion because I failed to consider that Dr. Cali based his opinion on evidence not admitted into the record; specifically, Dr. Michael Miller's negative interpretation of Claimant's September 20, 2001 X-ray. BRB at 7. The Board agreed with Claimant that it was reasonable for me to find that Dr. Cali's failure to diagnose coal workers' pneumoconiosis could have been based in part upon Dr. Michael Miller's excluded negative interpretation of the X-ray. Id. The Board therefore vacated my finding pursuant to § 718.202(a)(4) and remanded with instructions to address the significance of Dr. Cali's reliance upon an inadmissible X-ray report. BRB at 8.

Dr. Cali examined Claimant on September 17, 2001, and filed a report on a standardized DOL, OWCP Form: CM-988. DX-10. At Section 5 of the report, Dr. Cali was directed to list the tests which he reviewed and relied upon, at least in part, to base his medical opinions. DX-10 at 3. Dr. Cali noted "See attached" next to (a) Chest X-ray, (b) Vent Study, and (c) Arterial Blood Gas. Id. On the next page of the report, Dr. Cali reported his prognosis that Claimant was totally disabled due to "asthma." DX-10 at 4. The results to the tests that Dr. Cali referred to in DX-10 at 3 are not attached to the Form: CM-988 admitted into the record. Because of this, the Director accurately argued on appeal that Dr. Cali did not specifically identify the X-ray interpretation upon which he relied upon in rendering his opinion. BRB at 7. However, the Board noted that on Dr. Michael Miller's X-ray report, he indicated that his interpretation of Claimant's September 20, 2001 X-ray was ordered by Dr. Cali. Excluded DX-14. In fact, Dr. Miller's report at DX-14 notes that the X-ray was ordered on September 20, 2001, three days after Dr. Cali physically examined Claimant. Excluded DX-14. Dr. Cali's discussion of cardiopulmonary diagnosis and impairment is dated October 16, 2001. DX-10 at 4. I therefore agree with the Board that it is reasonable to find that Dr. Cali, at least in some part, relied upon Dr. Michael Miller's inadmissible X-ray interpretation when formulating his opinion in this matter.

As the Board discussed, § 725.414 provides that any X-ray referenced in a medical report must be admissible. 20 C.F.R. §§ 725.414(a)(2)(i), (a)(3)(i). However, the regulations "do not specify what is to be done with a medical report or testimony that references an inadmissible X-ray." See Dempsey v. Sewell Coal Co., BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*) (published). The Board in Dempsey held that the ALJ did not abuse his discretion in declining to consider a physician's opinion regarding the existence of pneumoconiosis when he found the opinion "inextricably tied" to an inadmissible X-ray reading. Id.

It is difficult to ascertain from this record whether Dr. Cali's report is "inextricably tied" to the inadmissible X-ray interpretation of Dr. Miller. Dr. Cali diagnoses Claimant with asthma but gives no etiology of the disease. DX-10 at 4. It is clear from the report that Dr. Cali relied upon an employment history, a patient history, a smoking history, a physical examination, at least one chest X-ray, at least one pulmonary function study, and at least one arterial blood gas study in drawing his conclusions. See DX-10 at 1-5. The record is unclear, however, as to how

much weight Dr. Cali put on each test or finding in formulating his diagnosis. In fact, the record is not even clear on how many chest X-rays or other objective tests Dr. Cali reviewed.[14] Consequently, any attempt to infer whether Dr. Cali's opinion is or is not "inextricably tied" to Dr. Miller's X-ray interpretation would be clear speculation on my part; speculation which I decline to make. For that reason, rather than disregard Dr. Cali's opinion completely, I find that since the record as a whole suggests that Dr. Cali relied upon an inadmissible X-ray, the probative weight of his opinion is severely diminished.[15] I decline to disregard it completely because his report is clear that his opinion was based upon more than just an X-ray interpretation. In addition, the fact that Dr. Cali's report does not document which X-ray he relied upon further diminishes how well-documented the report is, which undermines its probative value.

A medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion that is based on a physical examination, symptoms and a patient's work and social histories may be found to be adequately documented. Hoffman v. B & G Construction Co., 8 B.L.R. 1-65 (1985). A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields, *supra*. A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Company, 12 B.L.R. 1-149 (1989).

I find on remand that the medical opinion evidence of record does not support a finding of presence of pneumoconiosis. Claimant offered the medical opinion of Dr. Raymond J. Kraynak, D.O., to support his position concerning the presence of pneumoconiosis. Dr. Kraynak reported:

> IMPRESSION
>
> Based upon [Claimant's] history of having worked in the anthracite coal industry approximately eight years, the complaints with which he has presented, my physical examination and the diagnostic studies performed, it is my opinion that he is totally and permanently disabled, secondary to Coal Workers' Pneumoconiosis, contracted during his employment in the anthracite coal industry. He is unable to lift, carry, climb steps or walk for any period of time. He must be able to sit, stand and lay at his leisure, secondary to his severe respiratory impairment.

[14] Although I agree with the Board that it is reasonable to infer from Dr. Miller's report that Dr. Cali relied upon Dr. Miller's negative X-ray interpretation, it is by no means conclusive. Dr. Benjamin interpreted the same September 20, 2001 X-ray as completely negative on October 14, 2001. DX-13. Since Dr. Cali's report is dated October 16, 2001, it is also possible that Dr. Cali relied upon and/or reviewed Dr. Benjamin's admissible interpretation or that he relied upon both interpretations.

[15] I say that the weight of his opinion is diminished, as opposed to disregarding it completely, because I would certainly consider the opinion of Dr. Cali when corroborating another physician's testimony. However, standing alone, his opinion would not merit the amount of consideration of other physicians of record who based their opinions on admissible evidence.

CX-13 at 4. As his report reveals, Dr. Kraynak's diagnosis of coal workers' pneumoconiosis was based upon an erroneous length of coal mine employment. I have credited Claimant with a coal mine employment history of four and one-half years. Dr. Kraynak's prognosis is based upon a coal mine employment history almost double the length of time that I have credited Claimant with (approximately 44% more). That discrepancy is quite significant. Because Dr. Kraynak relied upon a significantly erroneous coal mine employment history, the reliability of his diagnosis is undermined and the probative value of his report is significantly diminished.

Further, although Dr. Kraynak has treated Claimant, I decline to accord his opinion controlling weight. The record does not fully document the nature of the physician-patient relationship and its duration, or the frequency and extent of his treatment, so as to merit controlling weight. See, 20 C.F.R. § 718.104(d)(1)-(4).

Similarly, Dr. Cali's medical opinion is also not well-reasoned. Dr. Cali opined that Claimant was disabled from asthma without disclosing the etiology of the disease or discussing the basis for that diagnosis. In addition, as previously stated, Dr. Cali's diagnosis was likely based, at least in part, on an inadmissible X-ray interpretation. For that reason, the probative value of his report is greatly reduced.

I find that the medical opinion evidence fails to demonstrate the presence of pneumoconiosis, pursuant to 20 C.F.R § 718.204(a)(4).

3) Penn Allegheny Balancing Test

The Third Circuit has held that, in considering whether the presence of pneumoconiosis has been established, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 25 (3d Cir. 1997).

After weighing all of the relevant evidence of record, I find that Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. There were five admitted interpretations of two X-rays on record. Three interpretations were positive for pneumoconiosis while only two were negative. Further, one of the two negative interpretations was given by the least-qualified physician to interpret the X-rays. In addition, the Director has failed to rebut or undermine the X-ray evidence with sufficient medical opinion evidence. The Director's medical expert opined that Claimant suffered from asthma but failed to identify which X-ray of record he relied upon. In addition, the evidence suggests that the doctor relied on an inadmissible interpretation.

Accordingly, based upon the weight of the X-ray evidence, I find that Claimant has established the presence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a).

C. Whether the Pneumoconiosis Arose Out Of Coal Mine Employment

In my original D&O, I found that Claimant had not established that his pneumoconiosis (*arguendo*) arose out of coal mine employment because I only credited him with six years of coal mine employment and he was therefore not entitled to the rebuttable presumption of 20 C.F.R. § 718.203(b). On appeal, the Board vacated my finding because I had not addressed whether Claimant had established the "arose out of" element of entitlement pursuant to 20 C.F.R. § 718.203(c). BRB at 8-9.

The regulations mandate that in order for a claimant to succeed on a claim for benefits under the Act, "it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). Specifically, the claimant's burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." Shoup v. Director, OWCP, 11 B.L.R. 1-110, 1-112 (1987). An inference that the miner's pneumoconiosis was caused by coal dust exposure may be raised "if the record [affirmatively] indicates [that there was] no other potential dust exposure." Wisniewski v. Director, OWCP, 929 F.2d 952 (3rd Cir. 1991).

Since I have only credited Claimant with four and one-half years of coal mine employment, he is not entitled to the rebuttable presumption found at § 718.203(b). However, Claimant may still attempt to establish the "arose out of" element with competent evidence pursuant to § 718.203(c). In his brief, Claimant contended that the reasoned medical opinion of Dr. Kraynak establishes the causal relationship of the Claimant's pneumoconiosis to his coal mine employment. CB at 13. Claimant also noted that no physician of record attributed Claimant's pneumoconiosis to any other etiology. Id. In his report, Dr. Kraynak stated, "…it is my opinion that [Claimant] is totally and permanently disabled, secondary to Coal Workers' Pneumoconiosis, contracted during his employment in the anthracite coal industry." CX-13 at 3. The Director argued in his original brief that "the conclusory statements contained in the Kraynak report are insufficient to establish a causal relationship because they present no competent medical evidence to establish such a relationship as required by [the Act]." DB1 at 6. I agree with the Director. Dr. Kraynak explicitly stated that his opinion was based upon Claimant's coal mine employment of approximately eight years, Claimant's complaints, the physical examination of Claimant, and the diagnostic studies performed. CX-13 at 3. Because Dr. Kraynak's medical opinion was based upon a significantly erroneous length of coal mine employment history, I find that his opinion is not competent evidence under the Act. The length of coal mine employment he used in basing his opinion and Claimant's actual length of coal mine employment are too significantly disparate to render his opinion competent.

Accordingly, I find that Claimant has failed to establish that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. § 718.203(c).

D. Whether Claimant is Totally Disabled Due to Pneumoconiosis

In my original D&O, I found that Claimant had established that he was totally disabled, pursuant to 20 C.F.R. § 718.204(c), because the Director had stipulated to total disability and I found that the record supported that stipulation. D&O at 9. However, by specifically crediting Dr. Cali's opinion as the most consistent with the totality of the evidence, I found that Claimant had not established that his total disability was due to pneumoconiosis. Id. On appeal, the Board vacated my finding that the evidence was insufficient to establish that Claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. § 718.204(c), BRB at 10, because the Board noted its agreement with the Director's argument that I erred in my consideration of Dr. Kraynak's opinion. BRB at 9. Specifically, the Director argued that my criticism of Dr. Kraynak's opinion was inappropriate because my ultimate finding on this issue was based upon my own interpretation of the medical data. BRB 9-10.

The regulations mandate that a claimant shall be considered totally disabled due to pneumoconiosis if the claimant's pneumoconiosis "is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. § 718.204 (c)(1). That provision defines a "substantially contributing cause" of the claimant's disability as:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

§§ 718.204(c)(1)(i) and (ii). The cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2).

Claimant has proffered the report of Dr. Kraynak as his documented and reasoned medical report evidence pursuant to § 718.204(c). Dr. Kraynak reported that it was his opinion that Claimant "is totally and permanently disabled, secondary to Coal Workers' pneumoconiosis." CX-13 at 3. Again, I reiterate that because Dr. Kraynak's opinion is based upon an erroneous coal mine employment history, the probative value of his report is greatly diminished. No other physician of record opined that Claimant was totally disabled due to pneumoconiosis. Because Dr. Kraynak's unreliable opinion is not corroborated with another physician's opinion, I find that Claimant has failed to sustain his burden.

Accordingly, I find that Claimant has not established that he is totally disabled due to pneumoconiosis.

IV. CONCLUSION

Based upon my review of the evidence on remand, I credit Claimant with four and one-half (4 ½) years of coal mine employment and find that he has failed to establish entitlement to benefits under the Act. Claimant established the presence of pneumoconiosis and demonstrated that he is totally disabled. However, he failed to establish that his pneumoconiosis arose out of

coal mine employment pursuant to 20 C.F.R. § 718.203(c), and failed to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. § 718.204(c).

V. ATTORNEY'S FEES

The award of an attorney's fee is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of MATTHEW J. CHUPLIS for benefits under the Act is hereby DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).